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COURT OF APPEALS NO. 249816-III

BY RONALD R. CARPENTER

SUPREME COURT
OF THE STATE OF WASHINGTON
NO. 80996-8

CLERK

AMBER KAPPELMAN, Petitioner,

vs.

THEODORE J. LUTZ, Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The respondent is Theodore Lutz, who was the respondent in the Court of Appeals and the defendant at trial.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the decision in *Kappelman v. Lutz*, ___ Wn. App. ___, 170 P.3d 1189 (2007). The decision was filed on November 6, 2007 and was published.

III. ISSUE PRESENTED FOR REVIEW

Issue 1. Did the trial court abuse its discretion in excluding evidence that Mr. Lutz did not have the statutory motorcycle endorsement which would authorize him to carry a passenger and operate the motorcycle during statutory hours of darkness?

IV. STATEMENT OF THE CASE

On June 19, 2000 Amber Kappelman was a passenger on a motorcycle operated by Theodore Lutz northbound on State Route 141 north of Hussum, Washington. (RP 59, 187, 188-189, 213)

A deer came down a hill to the left of the roadway ahead and entered the roadway, moving from left to right. (RP 211-212, 213) The motorcycle struck the deer, ejecting Ms. Kappelman, and injuring her. (RP 196-197)

Mr. Lutz filed a Motion in Limine which moved for exclusion of evidence that he operated the motorcycle in violation of conditions of his motorcycle instruction permit, and that he was given an infraction citation for doing so. (CP 7) The permit had been issued under RCW 46.20.510, and authorized Mr. Lutz to operate the motorcycle upon public highways, but not during statutory "hours of darkness", and not while carrying a passenger. The Trial Court reviewed briefing and heard argument on the Motion and entered its Order granting the Motion. (Report of Proceedings – Motions in Limine, hereinafter: "RP-MTN", 1-17) (CP 10-29) The Court ruled that the proposed evidence was "highly prejudicial," and was without relevance. (RP-MTN 15; RP 10-11)

Ms. Kappelman testified that she and a friend were visiting the home of an acquaintance on the date of the accident, and that Ms. Kappelman accepted the suggestion of her friend that she go for a motorcycle ride with Mr. Lutz. (RP 60-61) Ms. Kappelman was never on a motorcycle before the accident, nor since. (RP 110, 113)

Ms. Kappelman testified that after leaving the town of Hussum Mr. Lutz accelerated and then let up on the accelerator after she yelled at him to slow down. (RP 72) At that point she looked up and saw a deer in the left lane ahead, moving slowly to the right. (RP 72) She testified that it

appeared to her that Mr. Lutz was trying to beat the deer to the right side of the road, to go around the deer. (RP 72) Impact with the deer occurred approximately two to three seconds later, ejecting Ms. Kappelman from the motorcycle. (RP 72)

Ms. Kappelman described the lighting conditions as dusk, and testified that she saw the deer clearly when she looked up at the road ahead. (RP 73)

Ms. Kappelman testified that she had estimated in her January, 2004 deposition that the deer was approximately 75 feet away when she first saw it. (RP 124) At trial she provided an estimate of 250 to 300 feet, after returning to the accident location and taking measurements. (RP 75, 79)

Upon impact with the deer, she flew off the motorcycle and slid down the roadway. (RP 79-80)

Ms. Kappelman told her doctor that she had been a passenger on a motorcycle and that they were going 50 to 55 miles per hour and hit a deer; she testified that she was referring to the impact speed. (RP 129) She also told the same doctor that they had been going 90 miles per hour and had slowed down to 70 before hitting the deer. (RP 129-130)

Randall Cashatt, a trooper with the Washington State Patrol, responded to the scene of the accident. (RP 149) He found a 41 foot, 6 inch long skid mark made by the motorcycle immediately prior to impact with the deer. (RP 154, 156)

Mr. Lutz was called to testify as a witness by Ms. Kappelman. He was 21 years of age at the time of the accident. (RP 185) He purchased the involved motorcycle and took possession of it approximately three months before the accident date. (RP 185) It was the first street motorcycle he had owned. (RP 186) He had ridden off road dirt bikes for four or five years. (RP 210)

He had graduated from high school in 1998 in White Salmon, Washington, and at the time of trial was working as a journeyman electrician. (RP 209-210)

He testified that he operated the motorcycle northbound on State Route 141 through the town of Hussum at 45 miles per hour. (RP 188-189) After leaving Hussum, he accelerated past the 55 mile per hour speed limit on the open highway. (RP 189) After traveling roughly a quarter of a mile he saw the deer on a hillside to the left of the highway. (RP 190) It was dusk, but visibility was clear for at least 300 or 400 feet. (RP 192-193) He estimated that the deer was approximately 200 feet

away when he first saw it. (RP 210) He saw the deer come out of some trees and move down the hill toward the highway “at a pretty good rate of speed”. (RP 210-211) Mr. Lutz estimated that the motorcycle’s speed at that time was between 60 and 65 miles per hour. (RP 211) He responded to seeing the deer moving toward the highway by letting off the accelerator and beginning to apply his brakes and moving toward the right side of the highway.¹ (RP 193, 212) He believes that he downshifted one or two gears, and he applied the brakes as hard as he could while still maintaining control over the motorcycle.² (RP 212) He did not apply the brakes full force when he saw the deer because he did not feel he needed to, but also because he was concerned about putting the motorcycle into a skid and laying it down on the pavement if he did so. (RP 212-214) He was able to maintain control of the motorcycle all the way up to the point of collision with the deer. (RP 213)

As he approached the deer, it was moving from left to right, across the southbound lane, and approaching his northbound lane of travel. (RP 213) He was concerned about steering left into the southbound lane,

¹ Petitioner erroneously states Mr. Lutz steered to the right **shoulder** of the highway. (Petition for Review, p.3) The testimony was that he steered to the right side of his lane of travel. (RP 193, 212)

² Petitioner states that Mr. Lutz used his brakes “only later”. (Petition, p.3) The testimony was that he used a controlled braking until he got close to the deer, and then applied the brakes full force. (RP 196, 212)

which the deer was crossing, so he steered toward the right side of his northbound lane. (RP 212-214) As the deer continued moving into his path, he eventually realized that he was not going to be able to avoid contact with it, and he applied the brakes hard, causing the tires to skid roughly 50 feet immediately before impact. (RP 196) The front of the motorcycle in the area of the headlights hit the deer in the head and killed it. (RP 196, 214-215)

Mr. Lutz estimated the entire span of time between his first seeing the deer and it's reaching the right side of the road (the northbound lane, in which the motorcycle was traveling) at approximately three seconds. (RP 221) Ms. Kappelman estimated that impact occurred two or three seconds after she saw the deer in the southbound lane. (RP 72)

Robert Stearns, an accident reconstruction consultant, testified on behalf of Ms. Kappelman. He reviewed the available documentation to arrive at an opinion on the speed of the motorcycle and possible accident avoidance factors. (RP 238) He testified to his opinion that the motorcycle was traveling in the vicinity of 70 to 77 miles per hour prior to the braking which was shown by physical evidence. (RP 245-246) After considering testimony that the roadway had been repaved between the accident date and the date of Mr. Stearns' inspection, he reduced his speed

estimate to 69 to 76 miles per hour. (RP 285) He described this estimate as conservative, and testified that the actual speed may have been higher but cannot be accurately calculated because of unknown energy loss factors which cannot be quantified. (RP 285-286)

Mr. Stearns reviewed Mr. Lutz's deposition testimony estimating that the deer was approximately 200 feet away when he first saw it, and calculated that if he had been going at the 55 mile per hour speed limit at that point he would have needed 224 feet to safely bring the motorcycle to a stop. (RP 255-256, 258) If he used the most appropriate co-efficient of friction (drag factor) of .70 due to the 2003 repaving, Mr. Stearns calculated that the motorcycle still would have been traveling approximately 23 miles per hour when it reached the point of impact with the deer if its initial speed had been at the speed limit of 55 miles per hour when the deer was 200 feet away and Mr. Lutz reacted to seeing it. (RP 294-295) This calculation was made using a perception reaction time of 1.0 seconds, which Mr. Stearns believed was appropriate. (RP 295) If Mr. Stearns used a perception-reaction time of 1.5 seconds, which he agreed would not be unreasonable, the motorcycle would have been traveling approximately 36.9 miles per hour at the point of impact. (RP 297, 300)

If he assumed that the deer was first visible approximately 300 feet away, based on the testimony of Ms. Kappelman, Mr. Stearns calculated that Mr. Lutz could have brought the motorcycle to a stop prior to reaching the point of impact if his initial speed had been between 50 miles per hour and 65 miles per hour. (RP 262-263)

Mr. Stearns testified that when Mr. Lutz realized he was in trouble, he employed his brakes as much as he could while also decelerating by way of shifting down, and that he ended up locking his rear wheel but managed to keep sufficient pressure on the front brake as well that his bike pretty well went in a straight line prior to impact. (RP 289-290)³ He agreed that gradual braking allows a better opportunity to keep control of the vehicle than does emergency braking. (RP 293)

The jury answered the Special Verdict Form by indicating that Mr. Lutz was not negligent. (CP 64)

V. ARGUMENT

A. **The Trial Court acted within its broad discretion in excluding the motorcycle endorsement/permit evidence, and the Court of Appeals properly deferred to the Trial Court's exercise of that discretion**

³ The Court of Appeals' opinion says Lutz "hit the brakes and lost control of the motorcycle." *Kappelman v. Lutz*, ___ Wn. App. ___, 170 P.3d 1189, 1191 (2007) Mr. Stearns' testimony, as well as that of Mr. Lutz (RP 213), establish that the motorcycle was kept under control until impact with the deer.

Rulings under Evidence Rule 401 on the relevance of offered evidence are within the sound discretion of the Trial Court, and will be reversed only upon a showing of manifest abuse of discretion. *Crescent Harbor Water Company, Inc. v. Lyseng*, 51 Wn. App. 337, 344 (1988). *State v. Stenson*, 132 Wn.2d 668, 701 (1997) The same is true of a Trial Court's rulings under Evidence Rule 403 that any possible probative value of offered evidence is substantially outweighed by the danger of unfair prejudice which would result from its admission. *State v. Coe*, 101 Wn.2d 772, 782 (1984); *Safeco Insurance Company of America v. JMG Restaurants, Inc.*, 37 Wn. App. 1, 5 (1984). Reasonable minds often differ as to how to strike the balance between probative value and unfair prejudice, and the trial judge in general is in a better position to weigh the competing considerations. *Holz v. Burlington Northern Railroad Company*, 58 Wn. App. 704, 708 (1990).

A manifest abuse of discretion is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons". *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26 (1971). Stated otherwise, a manifest abuse of discretion occurs only when no reasonable person would take the view adopted by the Trial Court. *Radford v. City of Hoquiam*, 54 Wn. App. 351, 354 (1989).

The issues raised by defendant's First Motion in Limine were thoroughly briefed and argued in the Trial Court. (CP 10-29; RP MTN 1-

17) The Trial Court then granted the Motion, ruling as follows:

"The issue, of course, is whether or not it's relevant... that Mr. Lutz did not have a motorcycle endorsement, that he was just operating under an instructional permit and had violated the instructional permit. The general rule as set forth in *Holtz* [sic] is that... the fact that somebody is not licensed... in this case not a licensed motorcycle driver, is irrelevant. There are some situations where violation of a statute can be admissible as negligence. It's not negligence per se but it can be admissible as negligence. In this case, however, I can't find that the fact that Mr. Lutz was operating without a valid endorsement is really relevant to how he operated the motorcycle.

The real issue in this case is was he... was he negligent? Was he speeding? Was he not keeping a proper lookout? Did he lose control of the motorcycle because of his negligence? Did that cause the injury? ... Mr. Lutz could have been fully qualified as a motorcycle operator and still be negligent. The fact that he wasn't fully qualified under state law as a motorcycle operator doesn't mean that he was or wasn't negligent.

. . . .

So I am holding that it is irrelevant in this case for evidence to be introduced that Mr. Lutz was operating without a motorcycle endorsement under an instructional permit and that he was violating an instructional permit and any evidence to that affect, including evidence of the Citation, will not be allowed at trial." (RP MTN 15-16)

Likewise, the Trial Court considered the danger of unfair prejudice from the excluded evidence, and ruled that any possible relevance of it was substantially outweighed by that prejudice:

“To admit that... into evidence that he also did not have a motorcycle endorsement I believe, first of all, is highly prejudicial and we all know that juries often make decision based on things like that and that’s not what a jury should be making a decision on in this case.” (RP MTN 15)

The Trial Court acted within its discretion in granting the Motion in Limine. The Court’s ruling irrelevant Mr. Lutz’s statutory violations and lack of a motorcycle endorsement were based on the Court’s opinion that no evidence was offered which would indicate that the accident was more likely to happen because of the statutory violations. The Trial Court was correct in this analysis.

The fact that the motorcycle was operated during “hours of darkness” was not shown to have any significance in the occurrence of the accident. Mr. Lutz saw the deer as it emerged from trees on a hill above the roadway; he had no difficulty seeing it, and the amount of ambient lighting played no role. (RP 192-193; 211) He saw the deer from a distance of about 200 feet. (RP 210) It was dusk, but visibility was clear for at least 300 to 400 feet. (RP 192-193) Likewise, Ms. Kappelman saw

the deer clearly from a distance she estimated to be 250 to 300 feet; she described the lighting conditions as “dusk”. (RP 72-74; 79; 128)

While the fact that Mr. Lutz was carrying a passenger on his motorcycle undeniably brought the plaintiff to the location of the accident and therefore could be considered a literal cause-in-fact, this does not make the endorsement violation legally relevant. Circumstances which do no more than bring the parties to the same location at the same time constitute a remote cause, not a proximate cause. *Channel v. Mills*, 77 Wn. App. 268, 277 (1995).

While factual questions related to the “but for” prong of proximate cause are generally for the jury, issues of the legal causation prong are questions of law for the Court. The Trial Court has the right and duty to exclude such offered evidence if the Court rules that “... as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.” *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 204 (2001).

Offered evidence of a statutory violation is not admissible unless there is substantial evidence that the violation proximately contributed to causing the accident. *Ward v. Zeugner*, 64 Wn.2d 570, 574 (1964).

With the lack of a proximate cause nexus, Petitioner's extensive discussion of the Restatement becomes unimportant.

Ms. Kappelman presented no evidence, nor made any offer of proof, that the collision with the deer would probably not have occurred if Mr. Lutz had not carried a passenger. Without such evidence or offer of proof, the Trial Court acted within its discretion in holding that the act of carrying the passenger was not legally relevant as a proximate cause of the accident.

In her Petition Ms. Kappelman offers for evidence of proximate causation only the testimony of Mr. Stearns that in general a lack of training increases the likelihood of an accident. (Petition page 13, footnote 9) No testimony was offered, however, that this particular accident would have been less likely to happen if Mr. Lutz had qualified for and obtained his motorcycle endorsement. Indeed, any such testimony would have been objectionable as speculative, particularly given the unpredictability of the movement of a deer in the path of the motorcycle.

Petitioner makes much of the statutes which provide for testing before issuance of a motorcycle endorsement. (Petition, page 2, footnote 1; page 14) She argues that the fact that Mr. Lutz had not passed the test

qualifying him for a motorcycle endorsement was relevant to his allegedly negligent failure to avoid hitting the deer on the highway.

The same argument could be made in every action involving allegations of negligence by an unlicensed motorist. RCW 46.20.130(1)(c), governing driver's license examinations, requires, among other things: "an actual demonstration of the applicant's ability to operate a motor vehicle without jeopardizing the safety of persons or property." Yet an allegedly negligent driver's unlicensed status is generally inadmissible. *Holz v. Burlington Northern Railroad Company*, 58 Wn. App. 704, 708 (1990) (citing 29 A.L.R.2d 963); see, e.g. *Weihs v. Watson*, 32 Wn.2d 625, 629 (1949).

The *Holz* Court specifically rejected an inference from a motorcycle endorsement of greater experience and knowledge in the operation of a motorcycle as a basis for admission of the lack of an endorsement, indicating that its probative value is "slight" in comparison to proof of what actually happened in the accident. (*Holz* at page 710, footnote 5)

The Trial Court also exercised its proper discretion in weighing the unfair prejudicial impact of the offered endorsement/permit evidence against its potential probative value. (RP MTN 15) The Court followed

the caution in the *Holz* case that evidence of a law violation bearing only slight relevance “will often be outweighed by the unfair prejudice naturally resulting from the jury hearing that the ... motorcyclist was breaking the law at the time of the accident in a way that, on its face, appears to be significant, but upon reflection, is not.” (*Holz* at page 710, footnote 5) The Trial Court was legitimately concerned that the case would be decided on the endorsement/permit evidence, and not on the evidence as to whether Mr. Lutz negligently operated the motorcycle at the time of the accident. (RP MTN 15)

The Trial Court is vested with wide discretion in balancing the potential probative value of offered evidence against its potential unfair prejudicial impact, confusion of the issues, and misleading the jury. *State v. Coe*, 101 Wn.2d 772, 782 (1984); ER 403.

The Trial Court properly applied the Evidence Rule 403 balancing test, and excluded the evidence within its proper discretion.

B. The Trial Court and the Court of Appeals did not misapply the principles of *Holz v. Burlington Northern Railroad Company*, 58 Wn. App. 704 (1990)

The facts in the *Holz* case were different from those in the instant case, but the principles announced there apply here nevertheless. Petitioner ignores these rules recognized by the *Holz* Court.

The *Holz* Court recognized that admission of evidence of a licensing violation inherently carries ER 403 dangers “because the jury might feel his family and personal administrator were less worthy of compensation than if he were a fully licensed rider, *i.e.*, a law-abiding citizen. Like character evidence generally, evidence of other bad or illegal acts tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.” (*Holz* at page 708)

The *Holz* Court also recognized that reasonable minds often differ as to how to strike the balance between probative value and unfair prejudice, so the trial judge is generally in the best position to weigh those competing considerations. (*Holz* at page 708)

The *Holz* Court noted the weak inference of greater experience or knowledge which might be derived from evidence that a rider had a full motorcycle endorsement (one of petitioner’s primary arguments in the case at bar), in comparison with the high likelihood of ER 403 prejudice by branding the rider without the endorsement a lawbreaker. (*Holz* at page 710, footnote 5)

The Court of Appeals in the case at bar applied these principles from *Holz* in upholding the Trial Court's discretionary weighing of the possible relevance of the licensing violations against the likely significant unfair prejudice from their admission. The Court of Appeals noted that Ms. Kappelman was allowed to explore the nature and extent of Mr. Lutz's experience riding motorcycles. The *Holz* Court noted that it was the law violation offered in evidence which must be shown to be a proximate cause of the injury, rather than the defendant's actions, in order for the violation to be legally relevant:

“Would a person with a motorcycle endorsement, enabling that person to ride unsupervised and at night, have been any better off, *i.e.*, any less likely to have suffered the same fate? Riding a motorcycle without supervision at night is not illegal; the Legislature has declared only that doing so without a motorcycle endorsement is. [Statutory citations omitted] To show a causal connection between **this illegality** and an accident, one must show that the accident was more likely to result from **it** than from the legal behavior of riding unsupervised at night *with* a motorcycle endorsement.” (*Holz* at page 707-708) (Bold face supplied; italics original)

The Court of Appeals properly deferred to the Trial Court's judgment as to whether the lack of an endorsement was probative, and whether any possible probative value was outweighed by the improper prejudice, confusion of the issues, and misleading of the jury from the central negligence issues related to the accident.

C. The Trial Court's and Court of Appeals' decisions did not violate *White v. Peters*, 52 Wn.2d 824 (1958)

In *White v. Peters*, this Court approved a jury instruction establishing negligence from a driver's operation of a motor vehicle without hand controls as required by his restricted driver's license. The evidence in *White* did support a finding that this violation contributed to the accident happening. (*White* at page 828) Although not detailed in the opinion, there was apparently evidence from which the jury could find that it took longer for the driver to alter the vehicle's course by use of a foot control than it would have with a hand control.

By contrast, there is no evidence in the case at bar which would support a jury's finding that Mr. Lutz's lack of a motorcycle endorsement affected his operation of the motorcycle at the time of the accident.


D. Ms. Kappelman was afforded a fair trial

As observed by the Court of Appeals, Ms. Kappelman was permitted to explore the extent and nature of Mr. Lutz's experience operating motorcycles. She was permitted to call an accident reconstruction expert who provided his opinions as to the motorcycle's speed. She was permitted (over objection) to provide her own estimate of the motorcycle's speed, although she never saw the speedometer and had never been on a motorcycle before or since the accident. (RP 63-64, 72)

She was provided the benefit of Mr. Lutz's candid acknowledgement that he was operating the motorcycle in excess of the posted speed limit. She was permitted, over objection, to elicit conclusions from the responding state trooper which he acknowledged were based upon no specific observations that he could recall and describe. (CP 38; RP MTN 17-31; RP 158)

Ms. Kappelman received a fair trial, and the Trial Court's exercise of its discretion on evidentiary rulings, as affirmed by the Court of Appeals, should be allowed to stand.

DATED this 2nd day of January, 2008.



JACKSON H. WELCH, WSBA #06094
Attorney for Respondent

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CERTIFICATE OF SERVICE

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I hereby certify that on the 2nd day of January, 2008, I served an
ANSWER TO PETITION FOR REVIEW by depositing in the United
States Post Office, Vancouver, Washington, an original and full, true and
correct copy thereof, with postage thereon prepaid, upon:

Ronald R. Carpenter
Supreme Court Clerk
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P.O. Box 40929
Olympia, WA 98504-0929

I further certify that on the 2nd day of January, 2008, I served an
ANSWER TO PETITION FOR REVIEW by depositing in the United
States Post Office, Vancouver, Washington, a full, true and correct copy
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